

NTSB Order No. EA-4115

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of March, 1994

Respondent.

Docket SE-12208

On March 6, 1992, Administrative Law Judge Joyce Capps issued an order¹ that granted a motion by the respondent for dismissal of the complaint in this proceeding as stale under Section 821.33 of the Board's Rules of Practice.² The

²Section 821.33 provides, in pertinent part:

6224

Administrator, on appeal from that dismissal, argues that the stale complaint rule was inapplicable because the complaint raised an issue of lack of qualification. He asks that the law judge's decision be reversed and the case remanded. For the reasons discussed below, the appeal will be denied.

The Administrator contends that the law judge erred because she dismissed the complaint on the authority of Administrator v. Air South, Inc., NTSB Order No. EA-2855 (1989), wherein we held that in the absence of a timely answer to a motion to dismiss for

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Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.

* * *

(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.

(2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall proceed to a hearing on the lack of qualification issue only, and he shall so inform the parties. The respondent shall be put on notice that he is to defend against lack of qualification and not merely against a proposed remedial sanction.

staleness, the law judge was required to dismiss a complaint, which did not allege a lack of qualification, under the express terms of Section 821.33(a)(1). This case, the Administrator submits, is not controlled by Air South because it did involve, even if it did not directly allege, a lack of qualification and, therefore, the stale complaint rule did not dictate dismissal where the Administrator's answer was not filed within the 15-day period specified in Section 821.33(a)(1).³ Instead, according to the Administrator, the law judge should have considered whether his answer, filed seventeen days after service of the motion, should have been accepted under our general rule on answers to motions, Section 821.14(c), a provision, the Administrator asserts, that unlike the stale complaint rule gives a law judge some "measure of discretion" to accept an answer out of time.⁴ The Administrator urges us to remand the case so that the law judge can exercise such discretion in this matter.⁵ We see no reason to do so, for assuming, without admitting, that the

³Dismissal for staleness is not available under Section 821.33 if the Administrator's complaint presents an issue of lack of qualification to hold an airman certificate. See, e.g., Administrator v. Ben-Hanania, NTSB Order No. EA-3540, at p. 6 (1992).

⁴Section 821.14(c) also sets forth a 15-day deadline for answering a motion. The only discretion a law judge would have to accept an answer not filed within that period would be to determine whether the failure to file on time, or the failure to request an extension of time to file an answer before the 15-day period ran out, was excusable for good cause shown. See Section 821.11.

⁵The law judge appears not to have received a copy of the Administrator's answer, filed on February 6, 1992. The motion to dismiss was filed on January 20.

Administrator could on remand establish good cause for not answering the motion to dismiss on time, something he has not attempted to demonstrate in his appeal brief to us, we have reviewed his answer and find in it no basis for disturbing the dismissal.

The Administrator's September 19, 1991 order of revocation, which became the complaint in this action following the respondent's appeal of the order to the Board, alleges that respondent on two occasions performed flights for compensation or hire when he did not hold authorization to conduct such flights under Part 135 of the Federal Aviation Regulations, "FAR," 14 CFR Part 135.⁶ The performance of the two flights established, according to the complaint, that respondent does not possess the good moral character required of an ATP certificate holder. See FAR section 61.151(b).

In his motion to dismiss, the respondent contended that the Administrator's allegation that he lacked the moral character to hold his Airline Transport Pilot certificate was a subterfuge intended to avoid dismissal, under the stale complaint rule, of charges that the Administrator recognizes were not communicated to respondent, in a proposed notice of certificate action, within six months after the FAA learned of the suspected unlawful flights.⁷ Citing Administrator v. Rothbart and Voorhees, NTSB

⁶Specifically, the Administrator asserted that the respondent by operating the two flights had violated FAR sections 135.5 and 135.293(a)(2).

⁷Respondent in his motion to dismiss appears to have

Order EA-3053 (1990), *reconsideration denied*, NTSB Order EA-3356 (1991) and Administrator v. Stewart, 2 NTSB 1140, at 1143 (1974) for the proposition that the Board will not allow its rule on stale complaints to be circumvented through the bad faith assertion of lack of qualification, respondent argued that similar charges in other cases have brought sanctions in the 20 to 60 day range and that in numerous cases involving seemingly far more serious operational violations no challenge to the pilot's good moral character had been advanced.

In his answer to the motion to dismiss, the Administrator did not respond to the charge of subterfuge, he cited no case in which revocation had been pursued for two unauthorized Part 135 flights, and he cited no case in which a pilot's good moral character had been placed in issue as the result of his performance of two or, for that matter, any number of such flights.⁸ Instead, the Administrator referenced, without discussion, two cases in which revocation had been upheld for conduct considerably more egregious in both magnitude and scope.⁹

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understood the Administrator's order to raise an issue of lack of qualification because it sought revocation. However, the order of revocation contains no express allegation either that respondent lacks qualification to hold his ATP certificate or that he does not possess the care, judgment, and responsibility required of a certificate holder.

⁸The answer also fails to explain why revocation of "any airman certificate" held by respondent would be proper when good moral character is required only for ATP certificate holders.

⁹The Administrator contended that revocation was justified here under the Board's decisions in Administrator v. Muscatine Flying Service, NTSB Order No. EA-2553 (1987) and Administrator v. Behrens, NTSB Order No. EA-3230 (1990). Behrens involved a

Although the answer did suggest that revocation was thought to be warranted because the respondent "led the customers to believe that they were dealing with ... an actual Part 135 operator," neither it nor the complaint provided any information or proffer in support of the implication, in the answer alone, that respondent had engaged in morally objectionable conduct in connection with any misapprehension his passengers entertained as to the nature of respondent's authority to transport them. In sum, the Administrator's answer neither demonstrated that Board precedent supported the sanction of revocation for the alleged Part 135 violations nor explained why this case would likely result in the affirmance of a sanction that had not been imposed in similar cases in the past.¹⁰

In view of the foregoing, it is of no real consequence whether the section 61.151(b) allegation was included in the

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private pilot, holding himself out as Behrens Aviation, who was found to have conducted seven unauthorized flights for compensation or hire, including some in an unairworthy aircraft.

The Board found revocation appropriate for the respondent's "multiple, deliberate" violations on a complaint alleging some fourteen different charges related to the unlawful commercial operation. In Muscatine, the corporate respondent had conducted three flights during a period when its Part 135 authority had been suspended, and the airman respondent in the case had operated those three flights as pilot in command, as well as two others that did not meet Part 135 requirements because they were performed in aircraft that were neither airworthy nor listed in Muscatine's operations specifications.

¹⁰Our decision suggests no judgment on whether the Administrator could in some case establish that revocation for one or two unauthorized Part 135 flights was justified. Until such a precedent exists, however, the potential for dismissal under Section 821.33 of a complaint taking that position is a factor which the Administrator should take into account.

complaint to evade a dismissal for staleness or reflected a genuine belief that an ATP certificate holder of good moral character would not or should not perform even one unauthorized Part 135 operation. In order to fairly present an issue of qualification, so as to defeat a stale complaint motion, it must be reasonably apparent, in light of existing case law or from the severity of the conduct described in the factual allegations themselves, that revocation would be the appropriate sanction if some or all of the charges in the complaint are proved. Because the complaint in this case does not meet that test, we will affirm the law judge's dismissal of the charges as stale.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied, and
2. The order of the law judge is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.